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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

O.H.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES,

Real Party in Interest.

F078780

(Super. Ct. Nos. 17CEJ300134-1, 17CEJ300134-2)

# OPINION

**THE COURT**[*]

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Leanne LeMon, Judge.

Chineme C. Anyadiegwu, for Petitioner.

No appearance for Respondent.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County Counsel, for Real Party in Interest.

[*] Before Levy, Acting P.J., Franson, J. and Peña, J.

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Petitioner O.H. (father) seeks extraordinary writ review (Cal. Rules of Court, rule 8.452) of the juvenile court's January 24, 2019, orders terminating his reunification services at an 18-month review hearing (Welf. & Inst. Code, § 366.22)[1] and setting a section 366.26 hearing as to his now seven-year-old daughter, V.W., and three-year-old son, William W. On appeal, father challenges the sufficiency of the evidence to support the court's detrimental return and reasonable services findings. He contends the court's orders must be reversed and the children returned to his custody under family maintenance services. He also contends the court abused its discretion in denying his request for unsupervised visitation. We deny the petition.

## PROCEDURAL AND FACTUAL SUMMARY

In April 2017, the Fresno County Department of Social Services (department) responded to a report of child abuse at the home of father and his then 21-year-old girlfriend, Angelica, mother of V.W. and William (mother). Father was attempting to hit V.W. when mother intervened and was hit in the face, injuring her mouth. The parents were known to the department, as they had a history of domestic violence dating back to 2014 and mother had sought emergency shelter several times.

Father, at 53, was significantly older than mother. He relocated to Fresno from Florida in 2014 to live with her and then two-year-old V.W. In August 2015, they had William. In May 2016, police responded to a report of child concealment at the parents' apartment. Several days earlier the parents argued over mother's use of a dating website. During the argument, father produced a knife and told mother to stab him. She refused and went to a women's shelter with the children. She obtained a temporary restraining order but it was dissolved after she failed to appear in the case. In August 2016, mother

[1] Statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

contacted the police to report domestic violence after father twisted her wrist while scuffling over the television remote. He was angry because she posted pictures of herself breastfeeding. Mother said father physically assaulted her once a week, but she had not reported it. She was issued an emergency protective order and father was arrested for misdemeanor domestic battery (Pen. Code, § 243, subd. (e)(1)). He pled no contest to the charge and was ordered to complete an anger management class, which he started in February 2017. The court issued a one-year domestic violence protection order.

A social worker interviewed the parents and V.W. at their residence. Father stated mother was cheating on him with a man she met on the internet. He denied hitting her or engaging in domestic violence with her, claiming she caused the injuries that resulted in his 2016 domestic battery conviction. Mother said there was domestic violence in the home, but she did not vigorously pursue legal action before because father forced her and the children out of the apartment and they were sleeping in the park. She also wanted to work things out with him. V.W. said father hit and called her mother names and told mother she was no good without him. V.W. was afraid of father and was worried about her parents fighting in the home. She said she wanted to "jump in and help" her mother "fight" father.

The department took the children into protective custody in May 2017 after mother reneged on her promise to take them to the women's shelter. The department filed a dependency petition, alleging the parents placed the children at risk of suffering physical harm and emotional damage because of the domestic violence (§ 300, subds. (b) & (c)), and placed the children together in foster care.

Mother identified an alleged father for V.W. and he submitted to paternity testing, which ruled him out. Meanwhile, father filed a form JV-505 "Statement Regarding Parentage," claiming he provided for V.W. from June 2014 until her removal and took full responsibility for her as if she were his biological daughter. The department amended the dependency petition, identifying father as V.W.'s presumed father.

The juvenile court found prima facie evidence to detain the children and ordered the department to offer the parents parenting, mental health, and domestic violence services, and supervised visitation. The court continued the jurisdictional hearing and conducted it in August as a combined jurisdictional/dispositional hearing.

Meanwhile, father completed domestic violence and mental health assessments. He was referred for an anger management class and Child Abuse Intervention Program (CAIP) offered at the women's shelter. He enrolled in the CAIP program in late June 2017, and in a parenting class in mid-July. On June 30, 2017, he completed the 12-week anger management class he was ordered to complete in his domestic battery case. The department accepted his completion of the anger management class as fulfillment of the anger management component of his reunification services plan.

On August 29, 2017, following the combined hearing, the juvenile court sustained the dependency petition, granted father presumed father status, and ordered the parents to complete the services previously offered. Father informed the social worker the restraining order had been dismissed and he and mother intended to remain an intact couple and reunify with the children.

At the six-month review hearing in February 2018, the juvenile court found the department provided the parents reasonable reunification services and there was a substantial likelihood the children would be returned to them by the 12-month review hearing. The parents were actively participating in their services and had progressed to weekly unsupervised visits with the children in their apartment. They were doing so well the department had scheduled a meeting that month to discuss overnight visits. In addition, father reported he was utilizing techniques he learned in his anger management class such as taking a break from a heated encounter and walking away. He also learned to communicate his feelings rather than reacting. He and mother had learned new ways of communicating with one another. Any progress they made, however, was short lived.

On April 25, 2018, mother reported that father assaulted her the day before by slamming the front door of their apartment on the left side of her body while she was seated in a chair. She complained of pain but had no visible injuries and declined medical treatment. She said she was going to the emergency shelter but did not want to press charges or obtain an emergency protection order. The police officer created a report for documentation only.

Mother was turned away from the emergency shelter for having previously left the shelter twice against their advice. She met with a social worker at the department and played an audio recording of her last conversation with father, which was transcribed as follows:

"[FATHER]: [W]here the f*** you was at?

"[MOTHER]: I'm just doing my homework then I'll leave[.]

"[FATHER]: [Y]ou leave now, I don't give a f***[.]

"[MOTHER]: [P]lease stop talking to me like that[.]

"[FATHER]: No, I will not[.]

"[MOTHER]: [W]hy, what I do to you ….[some loud background noise and commotion can be heard at this point…] Why you hitting me with the door… why you hitting me with the freaking door… that's it, I'm done."

Mother tried to talk to father but he refused, so she packed a bag and left. She said they argued the night before the incident and she stayed with "someone" but would not identify the person. The incident occurred the next day when she returned. She had not spoken to him since.

Father minimized the incident, explaining he returned from talking to a neighbor and may have hit mother's chair when he initially opened the door but denied being upset or cussing. However, when presented with the audio recording, he reacted by asking why mother was progressing in visits and he was not. Asked how he knew that, he showed the social workers a text message he received from mother about 15 minutes before,

stating "I get my overnights." He said they had spoken three or four times since the incident. He also expressed concern that she was talking to various men she met on dating sites and had strangers over at their shared apartment. She also took William on a bike ride at night in April without a helmet after he told her to walk instead. She was pulled over by a police officer who she begged not to give her a ticket because she had an open child welfare case. The officer cited her instead. The supervising social worker asked father if he could protect the children if mother returned to the apartment and they had liberal visits. He said he would not turn her away if she needed his help.

By June 2018, the parents had completed their service plan requirements. Nevertheless, the department recommended the juvenile court terminate reunification services at the 12-month review hearing. It was concerned that father did not acknowledge his angry outbursts were domestic violence and that they would continue. It was also concerned mother would remain in their hostile relationship, in part because she lacked family support and could not provide for the children. She struggled with homelessness, sometimes spending the night in the park. Meanwhile, the children were doing well with their care providers who wanted to adopt them. The department filed a modification petition under section 388 asking the court to restore supervised visitation for father.

In June 2018, on the date set for the 12-month review hearing, the court continued the matter so the department could file its report. The court continued the hearing again and reset it for August as a contested 12-month review combined with a hearing on the department's section 388 petition (combined hearing). At the combined hearing, the court continued reunification services until the 18-month review hearing, which it set for October 2018, and deferred ruling on the reasonableness of services until then. It also granted the section 388 petition but ordered the department to meet with the parents within 30 days to discuss visitation.

On October 25, 2018, the juvenile court convened the 18-month review hearing and set it as a contested matter for January 15, 2019. The court indicated it was inclined to find services were not reasonable because visitation had not progressed beyond unsupervised even though the parents completed their court-ordered services. It ordered the department to meet with the parents to discuss visitation by November 9.

Social workers met with the parents on November 6, 2018, to discuss liberal visits for mother and unsupervised visits for father. The parents were participating in therapy and father expected to complete his soon. Mother had been working full-time for nearly two weeks and was living at a shelter but was unable to have liberal visits there, so she applied for emergency housing. After excusing mother from the meeting, the supervising social worker told father the department was concerned that he completed two domestic violence courses, but refused to take any responsibility for the April incident. Father said the conversation captured in the recording was not him speaking to mother but to a neighbor who lived in a nearby apartment and who cursed. When one of the workers read the transcript of the conversation out loud, father became angry and crossed his arms. He was told his visits would remain supervised and he was advised to discuss the department's concerns with his therapist.

In mid-November 2018, mother secured an apartment but had to vacate it after discovering it was unlawfully sublet to her. She remained homeless until the end of the month when she obtained emergency housing. During the month, mother reported she was not benefitting from therapy.

On December 10, 2018, father's attorney filed a modification petition asking the juvenile court to grant him an unsupervised visit during the Christmas holiday, so he could take the children to see Santa Claus and to shop. As changed circumstances, he alleged his supervised visits were progressing well, he had completed his therapy sessions, and met his treatment goals. He believed the unsupervised visit would serve the children's best interest because their bond to him had increased through his consistent

visitation with them. The court summarily denied the petition on December 13, noting that the department had the discretion to advance visitation and father had not shown his circumstances had changed since the last hearing.

On December 13, 2018, a meeting was conducted at the women's shelter to discuss whether father might benefit from a program other than CAIP. A representative from the shelter suggested the 52-week Batterers Intervention Program (BIP) might provide him more tools and insight into domestic violence than the CAIP program, which focused more on the effects of domestic violence on children and parenting. Father said he was willing to take the class and was enrolled in it by the end of the month.

Meanwhile, new concerns arose about mother's ability to care for the children. In January 2019, V.W. reported they had to get food from a church and she was worried mother may lose her job. During a visit that month, V.W. stated mother did not feed her lunch. Mother denied that the children missed a meal. She acknowledged she received food once a week from the church. She purchased fast food for the children and snacks at a convenience store. As for housing, she was in a homeless shelter but hoped to live with her mother.

The department recommended the juvenile court terminate reunification services at the 18-month review hearing. Neither parent had demonstrated the ability to safely parent the children and the prognosis was poor even if services were continued.

On January 24, 2019, the juvenile court conducted a contested 18-month review hearing. Father was asked about the April incident and whether he considered it domestic violence. He stated he did not, explaining he pushed the door open with his heel after it hit him on the back. He didn't even know the door hit mother until he heard her hollering and cussing. He learned various relational skills in his parenting and CAIP domestic violence class. He learned, for example, a parent must relate to a child on the child's level and must place the children above all other concerns. He was able to apply these skills during his visits with the children which took place at the library. He and the

children looked at books, played on the computer, and attended library activities. The anger management class helped him recognize when he and others he was interacting with were getting angry and to drop the subject until everyone calmed down. He had been able to apply this skill to his relationship with mother. In the BIP domestic violence class, he was learning to develop healthy relationships. Father testified he and mother did not have a romantic relationship but a healthy co-parenting one. They contacted each other occasionally, but only to discuss the children. She sometimes called when she did not have any place to go but he told her he could not help her. He regularly visited the children under supervision and did not have any problems with them. If they were returned to him, he could care for them at home and he knew other people who could help him take care of them. He was receiving disability income and did not work. He would also be able to take them to school. He believed it would have been beneficial to him if the BIP had been offered to him sooner. Even if the court terminated his services, he planned to continue participating in them and to seek custody of his children.

Mother testified her relationship with father was strictly as a co-parent. She believed she could interact with him comfortably if it was in a public setting.

Social worker Regina Artiaga was questioned by the department and mother's attorneys. She explained why the department did not offer mother more than liberal visitation and testified about its concern she was not benefitting from therapy. Artiaga believed mother needed to make better decisions and to have a support system to have the children returned to her.

County counsel argued the department provided all the services it could, but the parents had not remedied the circumstances that necessitated the children's removal. As to father, counsel argued he had not shown any benefit after multiple domestic violence classes. The department believed it would be detrimental to return the children to parental custody and there was no greater probability of return even if the court continued services. In addition, the care providers were willing to adopt the children or assume

legal guardianship. With a legal guardianship, the parents could continue to work on their issues and petition the court for a modification petition.

Father's attorney did not argue for the children's return, but stated father had everything in place to care for them in his home. She did ask the court not to terminate his reunification services, arguing the delay in providing him suitable batterer's treatment created special circumstances which warranted a continuation of services.

The juvenile court found by clear and convincing evidence the department provided the parents reasonable reunification services, stating any concerns it had were alleviated by the testimony and the department's reports. The court acknowledged the parents technically complied with their services plans but believed that the April incident was domestic violence. It did not appear mother had separated herself from father or gained the knowledge necessary to protect the children from future domestic violence incidents. Although the court found the parents had made progress, it was not enough for where they were in the proceedings. The court found it would be detrimental to return the children to parental custody. The court terminated reunification services and set a section 366.26 hearing for May 9, 2019. The court ordered twice monthly three-hour unsupervised visits for father and two liberal visits a month for mother.

## DISCUSSION

### I.

### 18-Month Review Hearing

The 18-month review hearing generally marks the maximum allowable period of reunification services afforded a parent under the dependency statutes. (§ 361.5, subd. (a)(3)(A).) At that hearing, the juvenile court is required to return the dependent child to parental custody unless the court finds by a preponderance of the evidence that the return of the child would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. (§ 366.22, subd. (a)(1).) A parent's

failure to participate regularly and make substantive progress in court-ordered treatment programs is prima facie evidence that return would be detrimental. (*Ibid*.)

If the juvenile court finds it would be detrimental to return the child, it must set a hearing under section 366.26 to select a permanent plan. (§ 366.22, subd. (a)(3).) Section 366.22, subdivision (b), provides exceptions, however, which permit the court to continue services. Those exceptions pertain to parents who are residents of a court-ordered substance abuse treatment program; or recently discharged from incarceration, institutionalization, or the custody of the United States Department of Homeland Security; or who were a minor or nonminor dependent parent at the time of the initial hearing. The court must find the parent is making significant and consistent progress, there is a substantial probability the child will be returned, and that it is in the child's best interest to continue services to the parent. The court may continue services up to 24 months from the date the child was initially removed from parental custody. (§ 366.22, subd. (b).)

There is another possible exception that would allow the juvenile court to continue services beyond the 18-month review hearing, although there is a split of authority on this issue. The statute requires the court to determine whether reasonable reunification services were provided to the parent. (§ 366.22, subd. (a)(3).) Appellate courts are divided on whether the court must continue services if it finds reasonable services were not provided to the parent. (*In re M.F*. (2019) 32 Cal.App.5th 1, 21. (*In re M.F*.))

We conclude the juvenile court properly found it would be detrimental to return the children to father's custody, father was provided reasonable services, and none of the exceptions warranting additional services applied.

### A. Detrimental Return

Father contends the evidence was insufficient to support a finding of detrimental return because he completed his court-ordered services and he and mother were no longer in a relationship. The court could have returned the children to him under family

maintenance because he had a suitable home for them to live in and he was able to financially provide for them. Under family maintenance, the department could monitor the situation and ensure the children were safe.

On a challenge to the sufficiency of the evidence to support the juvenile court's finding, the question is not whether a contrary finding might have been made, but whether substantial evidence supports the finding made by the court. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) "The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order." (*Ibid.*) If the finding or order is supported by substantial evidence, it will be upheld. (*Ibid.*)

Father's technical compliance with his court-ordered services, though significant, is not conclusive in determining detriment. It simply means there was not prima facie evidence of detriment. The court must still consider whether he eliminated the conditions leading to the children's removal and whether they would be safe in his custody. (See, e.g., *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.) The risk of detriment, in this case, was the volatile relationship between father and mother and the potential that he would physically harm her and/or the children. Although they testified they were no longer involved in a romantic relationship, father and mother had a pattern of resuming their relationship when mother turned to father for lodging and financial support. Because they would continue to have contact while co-parenting the children and mother still struggled to support herself, the risk remained that they would reestablish a romantic relationship. There was also inherent detriment in the fact that father was prone to angry outbursts, which he minimized. Consequently, the court could find on that evidence that it would be detrimental to place the children with father, even under the supervision of the department.

**B. Reasonable Services**

Father contends the juvenile court's finding he was provided reasonable services was error because the domestic violence component of his services plan focused on the

effect of domestic violence on children rather than on domestic violence in an adult relationship. Consequently, the CAIP was inadequate to reunify his family and the department should have recognized that after the April 2018 incident and provided him the BIP. However, the program was not offered to him until December 2018, just before the 18-month review hearing. The delay in providing him suitable domestic violence services, he contends, was unreasonable and the court's order terminating reunification services must be reversed. We disagree.

"Family reunification services play a critical role in dependency proceedings. [Citations.] At the dispositional hearing, the court is required to order the agency to provide child welfare services to the child and his or her parents. (§ 361.5, subd. (a).) Services 'may include provision of a full array of social and health services to help the child and family and to prevent reabuse of children. (§ 300.2.) Reunification services should be tailored to the particular needs of the family." (*In re M.F.*, *supra*, 32 Cal.App.5th at p. 13.)

"At each review hearing, if the child is not returned to his or her parent, the juvenile court is required to determine whether 'reasonable services that were designed to aid the parent ... in overcoming the problems that led to the initial removal and the continued custody of the child have been provided or offered to the parent ...' (§§ 366.21, subds. (e)(8) & (f)(1)(A), 366.22, subd. (a).) The 'adequacy of reunification plans and the reasonableness of the [Agency's] efforts are judged according to the circumstances of each case.' [Citation.] To support a finding that reasonable services were offered or provided to the parent, 'the record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained *reasonable* contact with the parents during the course of the service plan, and made *reasonable* efforts to assist the parents in areas where compliance proved difficult ....' " (*In re M.F.*, *supra*, 32 Cal.App.5th at pp. 13-14.)

"We review a reasonable services finding ' "in the light most favorable to the trial court's order to determine whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*." ' [Citation.] In determining whether there is substantial evidence to support the court's reasonable services finding, we review the record in the light most favorable to the court's finding and draw all reasonable inferences from the evidence to support the findings and orders. We do not reweigh the evidence or exercise independent judgment, but merely determine whether there are sufficient facts to support the findings of the trial court. [Citation.] The burden is on the petitioner to show that the evidence is insufficient to support the juvenile court's findings." (*In re M.F.*, *supra*, 32 Cal.App.5th at p. 14.)

Father's children were removed because of ongoing domestic violence between him and their mother. At the detention hearing, the juvenile court offered father a domestic violence assessment, which he completed at the women's shelter. As a result, he was referred for other services, including an anger management class and the CAIP. The case plan prepared by the department for father required him to "demonstrate his understanding of the impact domestic violence has on children by refraining from any further incidents of domestic violence and abiding by any protective orders issued by the court." Father signed the case plan, acknowledging its requirements and the juvenile court ordered it into effect at the dispositional hearing. At no time did he claim the services provided by the CAIP were insufficient for his needs either by raising it on appeal from the dispositional orders or the court's reasonable services finding at the six-month review hearing in February 2018. Nor did he file a petition under section 388 asking the court to provide him a different type of domestic violence program. Having failed to do so, he acquiesced to the services plan as it was written and forfeited his right to now claim that the domestic violence services provided were inadequate for his needs;

in other words, that they were not reasonable. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 47.)

Further, even assuming the department should have perceived father's need for a service such as the BIP sooner, he fails to show that he was prejudiced by the delay. He fails to show for example that the BIP would have provided him skills to address his domestic violence that the anger management class did not. Father completed anger management in June 2017. He said he learned skills in the class that helped him better communicate with mother and diffuse potential conflict. As a result of his overall progress, he and mother were enjoying weekly unsupervised visitation with the children by the six-month review hearing in February 2018. The fact that father assaulted mother two months later does not mean his services were inadequate but that he had not mastered those skills.

### C. Exception to Termination of Services

Father acknowledges that none of the exceptions under section 366.22, subdivision (b) apply to him, but questions whether the statute should be applied more broadly to include continued services for the parent who was not provided reasonable reunification services. He points to a split of authority in case law whether the court must observe the 18-month deadline for setting a section 366.26 hearing in cases where reasonable services were not provided. (*In re M.F., supra,* 32 Cal.App.5th at p. 21.) Having concluded father was provided reasonable services, we need not analyze or take a position on the issue.

## II.

## Section 388 petition

Father contends the juvenile court's summary denial of his section 388 petition was error because he established the requisite showing of changed circumstances and best interest to warrant granting him unsupervised visitation with the children for the 2018

Christmas holiday. The department contends the issue became moot when the court granted him unsupervised visitation at the 18-month review hearing. We agree it is moot.

An issue is moot when an event occurs that makes it impossible for the court to grant any effectual relief. (See, i.e., *People v. Deleon* (2017) 3 Cal.5th 640, 645.) Father's challenge to the juvenile court's ruling on his section 388 petition is moot, not just because he was subsequently ordered unsupervised visits, but because the time frame for which he wanted visitation, i.e., the Christmas holiday in 2018, has now passed.

**DISPOSITION**

The petition for extraordinary writ is denied. This court's opinion is final forthwith as to this court pursuant to rule 8.490(b)(2)(A) of the California Rules of Court.